parate who are unable to sustain or pursue an argument advanced and is only a euphemism for abandoning it.

The Deputy Public Prosecutor in the course of his address to the Special President on the matter of sentence said that 'the charges are of a very serious nature' and urged 'a very deterrent sentence'. The Special President in his grounds of judgment equally stresses the serious nature of the charges. Of course, the charges are very serious, but in view of their gravity it is astonishing, to say the least, that no one thought of asking the appellants if they would in the circumstances wish to be legally represented or at least consult a lawyer, and more particularly so as a plea of not guilty had been entered for the 1st appellant by another President only the day before.

It is equally clear that the appellants were never told that they were then appearing in a different court with enhanced jurisdiction nor was there any indication given by the Special President that he was sitting as a Special President conferred with enhanced jurisdiction in the matter of sentence, and the Deputy Public Prosecutor confirms this. Assuming for a moment that the Special President could in fact lawfully take over these two cases, then they should have been proceeded with if at all as Sessions Court cases *per se*, but the Special President unquestionably took over the cases in the exercise of his powers as a President conferred with special jurisdiction and proceeded to impose a term of 7 years' imprisonment on the 1st appellant which is the maximum term imposable for each of the offences in the two charges preferred against him and which he could do by virtue of the then operative provisions of section 63(3) of the Act and which the other President who heard the cases on June 2 could not, as by the provisions of section 64(1)(a) of the Act as it then stood his power of imposing corporal punishment was limited to a maximum term of 5 years' imprisonment.

The Special President then goes on in his grounds of judgment to deal with the question of the case numbers allocated to the two cases and admits that Special Sessions Court case numbers were given to the two cases after they had been disposed of. Apparently the whole thing was done in such indecorous haste that when the appellants were brought before him on June 3 at about 11.30 a.m., as the Deputy Public Prosecutor informs me, the cases were still registered as Sessions Court cases and the original Sessions Court case numbers on the charge sheets were cancelled and substituted with Special Sessions Court case numbers only after the appellants had been convicted and sentenced. The Special President states in his grounds of judgment that this does not however invalidate the convictions and sentence and attempts to justify this by contending that the registration of a case is a clerical and administrative act, and that when an accused person is before his court, it can deal with him even if he was unlawfully brought before it, and in support refers as authority for this proposition two cases, one on the question of unauthorised entry on premises in a lottery case and the other pertaining to the admissibility of evidence illegally obtained, which in relation to his arbitrary and unwarranted action in calling up these cases in his court are about as relevant or as useful as footwear for the limbless torso.

The Special President's laboured and extraordinary attempt at self-justification, couched in the superlative degree, is illogical and decidedly not convincing, valid or sustainable, and the law he cites and seeks to rely on in support is totally irrelevant and wholly unrelated and extraneous to the context of the appellants' complaints in this matter. It would therefore appear that not only was the whole course of events culminating in the convictions and sentence improper but also illegal, as the Deputy Public Prosecutor properly concedes.

In the circumstances I have adumbrated, I must intercede and I accordingly proceed to do so. There will be no order on the appeal but in the exercise of my powers of revision I set aside the convictions and sentence imposed on both the appellants by the Special President and order that they be retried before a Magistrate who has now jurisdiction in the matter in view of the recent amendments to the Subordinate Courts Act. I allow bail to the 1st appellant in the sum of $5,000 in one surety and to the 2nd appellant in the sum of $1,000 also in one surety, and direct the Deputy Public Prosecutor to arrange for both appellants to be produced in the Magistrate's Court to-morrow morning.

Order accordingly.

Solicitors: *Jag-Jit Singh & Co.*

KOAY HENG SIEW v. PENANG ADVENTIST HOSPITAL

[O.C.J. (Gunn Chit Tuan J.) October 26, 1978]
[Penang — Civil Suit No. 383 of 1977]

Practice and Procedure — Service — Application to set aside — Person served — Locus standi — R.S.C. 1957 O. 12 r. 30, O. 70 r. 1.

This was an application by one S. Valaithum on whom a copy of the writ of summons in this suit was served for an order that the said writ of summons and/or that service thereof on him be set aside on the following grounds: a) the defendant named being a hospital had no legal personality and was not a legal person, b) the copy of the said writ of summons was personally served on him (S. Valaithum) without any statement in or notice attached to the said writ of summons thereof specifying in what capacity or for what reason the said service was effected on him. The plaintiff opposed on two grounds: a) that the said S. Valaithum had no *locus standi* to enter conditional appearance and b) that the said application was bad in that it had not complied with Order 12 rule 30 and contended that it was mandatory for the application to be supported by an affidavit.

Held: (1) the applicant in this case had *locus standi* not only because the plaintiff had served process on him but also because it was clear from the definition of "defendant" in Order 71 of the Rules of the Supreme Court that it would include any person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings;

(2) as a matter of practice it would be useful to support such an application by an affidavit to explain the grounds of objection relied on yet there was no such legal requirement in the Rules of the Supreme Court which only required an application to set aside proceedings for an irregularity to be made by summons or motion and that the grounds of objec-

tion must be stated in the summons or notice of motion, as the case may be;

(3) in the circumstances of this case no drastic action such as setting aside the writ of summons should be allowed thereby forcing the plaintiff to start fresh proceedings *ab initio*. The court was satisfied that it was clear in this case that the wrong person had been served with process. Under Order 70 rule 1 the court ordered that the service of the writ of summons in this case on the applicant be set aside.

Case referred to:-

(1) *Baillie* v. *Goodwin* 33 Ch. D. 604.

CIVIL SUIT.

Jag-Jit Singh for the applicant.

A.J. Muttiah for the respondent.

Gunn Chit Tuan J.: This was an application by way of summons-in-chambers of one S. Valaithum s/o A. Suppiah, on whom a copy of the writ of summons in this suit was served on July 13, 1977, for an order that the said writ of summons and/or that service thereof on him may be set aside and also that the costs of and incidental to his application may be taxed and paid by the plaintiff/respondent (hereinafter referred to as the 'plaintiff') in this case. In the applicant's said summons-in-chambers the following grounds of irregularity were stated, namely: —

(i) The defendant named above, being "Penang Adventist Hospital (Hospital Advent)" has no legal personality and is not a legal person, and is nowhere in the said writ of summons described as having any legal personality.

(ii) A copy of the said writ of summons was personally served on the said S. Valaithum s/o A. Suppiah without any statement in or notice attached to the said writ of summons or the copy thereof specifying in what capacity or for what reason the said service is effected on him.

When the parties first appeared before me in chambers on October 27, 1977 both counsel indicated that they would require some time to address me and I therefore adjourned the matter to Open Court for further arguments.

Mr. Muttiah for the plaintiff opposed the application and the first point taken by him was that the said Valaithum had no *locus standi* to enter conditional appearance through his solicitors and/or to file the memorandum of conditional appearance which he did on July 19, 1977. He referred to the following passage appearing on page 1121 of *Mallal's* Supreme Court Practice: —

"*Application to Set Aside — Locus Standi of Applicant.* A person applying to have the proceeding set aside must have *locus standi* for applying. *Madar Beebee Amal* v. *Ahna Mohamed Thambi Rowther*, (Suit No. 1105 of 1908, Singapore) — Hyndman-Jones C.J., 24th November, 1911."

With respect, I could not accept counsel for the plaintiff's contention and agreed with the submission of counsel for the applicant, Mr. Jag-Jit Singh, that the applicant in this case had *locus standi* not only because the plaintiff has served process on him but also because it is clear from the definition of "defendant" in Order 71 of our Rules of the Supreme Court, 1957, that the expression "defendant" *includes* any person served with any writ of summons or process, or served with notice of, or entitled to attend any proceedings.

Another point taken by counsel for the plaintiff was that the said application was bad in that it had not complied with Order 12 rule 30 of the Rules of the Supreme Court, 1957, which is as follows: —

"A defendant before appearing shall be at liberty, without obtaining an order to enter or entering a conditional appearance, to take out a summons or serve notice of motion to set aside the service upon him of the writ or of notice of the writ, or to discharge the order authorising such service."

He referred to the following passage on page 110 of *Mallal's* Supreme Court Practice and contended that it was mandatory for the application to be supported by an affidavit: —

"The summons or notice must state the grounds of irregularity and must be supported by affidavit. *Baillie* v. *Goodwin*, 33 Ch. D. 604 p. 608. See O. 70 r. 3; (S) O. LXIII r. 3."

I have perused the said case of *Baillie* v. *Goodwin*[1] and was not convinced that the *ratio decidendi* in that case was to the effect that it was mandatory for an application such as this to be supported by an affidavit. However, counsel for the plaintiff also referred to a sentence appearing on page 782 of Vol. 15 of the Encyclopaedia of Court Forms and Precedents which supports his view that an application to set aside a writ is supported by evidence on an affidavit. Counsel for the applicant, on the other hand, contended that there is no requirement, in our Rules of the Supreme Court, 1957, for an affidavit in support of such an application, whether in Order 12 rule 30 or in Order 70 rule 2(ii) of the said Rules. He pointed out that the only clear requirement is that "the grounds of objection must be stated in the summons ...", and this had been complied with in this application. Counsel also contended that, in any case, the said requirement appeared to be only directory, and in any event was now curable as a mere irregularity under the new Order 70 rule 1 of the said Rules. He also referred to the said case of *Baillie* v. *Goodwin*[1] and drew attention to the fact that in that case service of the writ was set aside even though the application itself did not state the objections intended to be relied on. He even contended that the passage on page 110 of *Mallal's* Supreme Court Practice referred to by counsel for the plaintiff was incorrect. It was also stated by counsel for the applicant that there have been cases where applications were made to set aside proceedings in which the irregularities were not apparent on the face of the proceedings or where some evidence as to facts had to be put before the court. In those circumstances an affidavit was necessary, but it was submitted that it was not a requirement of procedure. Counsel then supported his argument by referring to a note appearing on page 1078 of *Chitty and Jacob's* Queen's Bench Forms (20th Ed.) where it is stated that in summons to set aside proceedings for an irregularity, no affidavit is necessary if the irregularity be apparent on the face of the proceedings but it is generally useful to support the application by an affidavit explaining the grounds of objection relied on.

After considering the submissions of counsel on this application and with the greatest respect to the above-mentioned sentence of the learned authors of the Encyclopaedia of Court Forms and Precedents referred to by counsel for the plaintiff, I considered

that although it would, as a matter of practice, be useful to support such an application by an affidavit to explain the grounds of objection relied on, yet there is no such legal requirement in our Rules of the Supreme Court which only require an application to set aside proceedings for an irregularity to be made by summons or motion and that the grounds of objection must be stated in the summons or notice of motion, as the case may be.

Having regard to all the circumstances of this case I did not consider that any drastic action such as setting aside the writ of summons should be allowed thereby forcing the plaintiff to start fresh proceedings *ab initio*. But as I was satisfied that it was clear in this case that the wrong person had been served with process, I therefore, under Order 70 rule 1 of the Rules of the Supreme Court, 1957, and for the reasons stated above, ordered that the service of the writ of summons in this case on the applicant be set aside and that the costs of and incidental to the application be taxed and paid by the plaintiff to the said applicant.

Order accordingly.

Solicitors: *Jag-Jit Singh & Co.; Muttiah & Co.*

OOI CHIN SENG v. PUBLIC PROSECUTOR & ANOR.

[A.Cr.J. (Hashim Yeop A. Sani J.) November 1, 1978]
[Ipoh — Criminal Appeals Nos. 93 and 94 of 1976]

Fisheries — Appeal against forfeiture of vessels — Operating trawl net with engine 120 h.p boat within 12 mls. of coast — Whether magistrate erred in law in not holding an enquiry under section 407, Criminal Procedure Code — Fisheries Act, 1963, ss. 13, 15(1) — Fisheries, Maritime Regulations, 1967, regs. 3(b), 4(4), clause 1(a) of the Fifth Schedule — Criminal Procedure Code (F.M.S. Cap. 6), s. 407.

Criminal Law and Procedure — General provisions of s. 407, Criminal Procedure Code overridden by s. 15(1) of the Fisheries Act, 1963.

The two appellants in this case were the owners of motor boats which were forfeited by an order of the lower court. The accused persons (not the appellants) operating these boats had pleaded guilty to charges relating to "operating trawl net used with engine 120 h.p. boat" in waters within 12 miles off the coast of Perak. This was in contravention of the provisions of clause 1(a) of the Fifth Schedule made under regulation 4(4) of the Fisheries (Maritime) Regulation 1967 which provides that trawl nets shall be used only in waters beyond 12 miles limit of the coast. The appellants contended that the learned magistrate erred in law in summarily ordering the forfeiture of the boats without holding an enquiry under section 407 of the Criminal Procedure Code.

Held, dismissing both appeals: the general provisions of section 407, Criminal Procedure Code were overridden by the specific provisions of section 15(1) of the Fisheries Act 1963 with regard to disposal of property and in any case to have an inquiry would be meaningless for the Court must give effect to the express words of section 15(1) of the Act.

Cases referred to:-

(1) *Chung Khiaw Bank Ltd.* v. *Public Prosecutor* [1968] 2 M.L.J. 196.

(2) *Ong See Ke* v. *Public Prosecutor* [1976] 2 M.L.J. 146.

(3) *Public Prosecutor* v. *Lee Chin Chai* [1974] 2 M.L.J. 174.

(4) *Public Prosecutor* v. *Lee Chin Chai & Ors.* [1974] 2 M.L.J. 205.

(5) *Juk De Sa* v. *Public Prosecutor* [1975] 1 M.L.J. 283.

CRIMINAL APPEALS.

Yeap Ghim Guan for the appellants.

Lee Lim Huat (Deputy Public Prosecutor) for the respondent.

Hashim Yeop A. Sani J.: The two appellants namely, Ooi Chin Seng in respect of Parit Buntar Arrest Case PB(A) 96 of 1973 and Tan Sock Lan in respect of Parit Buntar Arrest Case PB(A) 194 of 1973 are the owners of motor boats registration No. PK 2781F and PK 2192F respectively, which form the subject matters in the two arrest cases referred to above. In both the magistrate's cases referred to the accused persons (who were not the appellants) pleaded guilty to charges relating to contravention of the provisions of clause 1(a) of the Fifth Schedule to regulation 4(4) of the Fisheries (Maritime) Regulations 1967 and punishable under section 13 of the Fisheries Act 1963. In both the cases the charges respectively were that the accused persons were each found "operating trawl net used with engine 120 h.p. boat" in waters 5½ miles off the coast of Kuala Gula, Perak, in the case of PB(A) 96 of 1973 and in waters 4.01 miles off the coast of Tanjong Piandang, Perak, in the case of PB(A) 104 of 1973, in contravention of the provisions of clause 1(a) of the Fifth Schedule made under regulation 4(4) of the Fisheries (Maritime) Regulation 1967 in that the said trawl nets shall be used only in waters beyond 12 miles limit of the coast.

The two appellants in this appeal were dissatisfied with the order of forfeiture of the vessels made by the learned magistrate and appealed against the forfeiture. Counsel for appellants argued solely on the following points:—

(a) That the learned magistrate erred in law in summarily ordering the forfeiture of the boats without holding an inquiry under section 407 of the Criminal Procedure Code.

(b) That the learned magistrate erred in law in not allowing the appellants to be heard.

(c) That the learned magistrate erred in law in holding that he had "no other choice" under the Act but to order forfeiture of the boats.

Grounds (a) and (b) can be dealt with together and ground (c) is one of construction.

It is the contention of the appellants that the two cases referred to in which the learned magistrate ordered forfeiture of the vessels did not fall under section 15 of the Fisheries Act, 1963 and therefore there was *discretion* as to forfeiture. As such the provision of section 407 of the Criminal Procedure Code should have been applied by the magistrate by holding an inquiry in which the owners of the vessels should be heard before any order of forfeiture could lawfully be made. In *Chung Khiaw Bank Ltd.* v. *Public Prosecutor*[1] the Federal Court in a criminal reference held that in respect of forfeiture of a motor vehicle seized under section 92 of the Road Traffic Ordinance, 1958, the court has discretion under section 92(4) of the Ordinance to forfeit the vehicle or to order the release of the vehicle and that the court should hold an inquiry under section 407(ii) of the Criminal Procedure Code and at such inquiry the